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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

SellPoolSuppliesOnline.com, LLC, **Civil Action No.**

Plaintiff,

v. **COMPLAINT**

Ugly Pools Arizona, Inc.; Brian Morris,
an individual, **CV-15-01856-PHX-PGR**

Defendants. **JURY DEMANDED**

Comes now Plaintiff SellPoolSuppliesOnline.com, LLC (“SPSO”) with its
complaint (“Complaint”) against Ugly Pools Arizona, Inc. (“Ugly Pools”) and Brian
Morris (collectively “Defendants”) and states as follows:

INTRODUCTION

1. This is an action for Copyright Infringement under the United States
Copyright Act of 1976, 17 U.S.C. § 101 et seq. (“Copyright Act”), and Unfair
Competition under Arizona common law

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff SPSO is a corporation registered in the State of Arizona, having its principal place of business in Maricopa County at 2885 N. Nevada, Ste. 160, Chandler, AZ 85225. SPSO provides, *inter alia*, website and online store platforms to swimming pool contractors and parts suppliers so that they may quickly and conveniently establish an online presence and grow their businesses.
3. Defendant Ugly Pools is a corporation registered in the State of Arizona, having its principal place of business in Maricopa County at 7558 W. Thunderbird Rd. Ste. 1-621, Peoria, AZ 85381, that builds and remodels swimming pools and sells supplies for them.
4. Defendant Brian Morris is the President of Defendant Corporation Ugly Pools and, upon information and belief, resides in Peoria, AZ.
5. Upon information and belief, at all times material hereto, Defendants operated through the acts of their employees, agents, representatives, servants, and the like, acting within their course of employment and scope of duties.
6. This Complaint alleges Copyright Infringement under the Copyright Act and this Court has subject matter jurisdiction over this federal question claim pursuant to 28 U.S.C. § 1338(a) ("Copyright").
7. This Complaint alleges Unfair Competition under Arizona common law, arising from the same transaction or occurrence as Plaintiff's Copyright Infringement claim, and this Court has subject matter jurisdiction over this claim pursuant to 28 U.S.C. § 1367 ("Supplemental Jurisdiction").

1 8. This Court has personal jurisdiction over Defendants because Defendants'
2 tortious, intentional, willful and malicious acts of copyright infringement and
3 unfair competition all occurred within this jurisdiction, were expressly aimed at
4 this jurisdiction, and caused harm Defendants knew or should have known was
5 likely to be suffered in this jurisdiction. Upon information and belief, this Court
6 also has personal jurisdiction over Defendants because they reside in this judicial
7 district and/or have transacted business in this judicial district.

8
9
10 9. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and
11 (c) because Defendants reside and may be found in this judicial district such that
12 they are subject to personal jurisdiction in this judicial district and a substantial
13 portion of the acts complained of herein occurred in this judicial district.

14
15 **ALLEGATIONS COMMON TO ALL COUNTS**

16 10. SPSO facilitates the online presence and online store of numerous
17 swimming pool contractors and parts suppliers throughout and around Arizona by
18 licensing its website platform ("Platform"), located on the Internet at
19 www.sellpoolsuppliesonline.com. The Platform consists of, *inter alia*, a
20 compilation of programs, representations, originally authored works and writings,
21 computer architecture and design, which provide SPSO licensees the infrastructure
22 to configure, implement, and maintain fully functional and attractive websites
23 based on the Platform that are personalized to each customer's business,
24 incorporate and effectively use search engine optimization ("SEO"), and provide
25 "drop-ship" delivery that dispenses with the need to maintain inventory.

1 11. SPSO initiated development of the Platform in 2011, completed the
2 Platform on or about June 2014, and first published the Platform on or about July
3 2014. The SPSO Platform is password protected and available only to licensees
4 who register and pay for use and access.
5

6 12. Upon information and belief, Defendants are in the business of building and
7 remodeling swimming pools, as well as selling pool supplies and accessories in
8 and around greater Maricopa County.
9

10 13. Defendants represented themselves to SPSO as prospective
11 customers/licensees who were honestly considering the license of SPSO's
12 Platform in order to create a website for their business based on same.
13

14 14. Defendants were provided access to an SPSO sales representative's ("Mark
15 Kessler" or "Kessler") copy of the server for the limited purpose of familiarizing
16 themselves with the Platform and to assist Defendants in making a purchasing
17 decision. Defendants were aware they would have to purchase a license to be
18 authorized to have further access to the Platform, to use it commercially, and that
19 the SPSO license governed the nature of their use of the Platform.
20

21 15. Defendants were in close contact with Kessler and SPSO management and
22 pressed for very detailed, confidential information about SPSO's Platform and its
23 underlying functionality under the pretense of purchasing a license and entering
24 into a long term commercial relationship for maintenance and support with SPSO.
25
26
27
28

1 See Exhibit A, email correspondence between SPSO and Defendants¹.

2 16. On September 16, 2014, while Defendants had access to SPSO's Platform
3 as prospective clients, an individual logged into SPSO's server from an Internet
4 Protocol ("IP") address located, upon information and belief, within one city block
5 of Defendants' primary place of business and downloaded a complete copy of
6 SPSO's Platform. See Exhibit B, SPSO's server log. Defendants did not disclose
7 the download of the Platform to SPSO at any time.
8

9
10 17. After a complete copy of SPSO's platform was downloaded, Defendants
11 immediately ceased all communications with SPSO.
12

13 18. Nearly a year after the Platform was downloaded and all communications
14 between SPSO and Defendants had ceased, Defendants published a website
15 located at www.allpoolsupplies.com, nearly identical to the Platform that required
16 SPSO three (3) years and hundreds of thousands of dollars to develop. See Exhibit
17 C, screenshots of SPSO's copyrighted photos ("Photos"); see also Exhibit D,
18 SPSO's Photos as used on Defendants' website; Exhibit E, listing and arrangement
19 of SPSO Photos; Exhibit F, listing and arrangement of Photos on Defendants'
20 website.
21
22

23 19. Upon information and belief, on September 16, 2014, it was Defendants
24 that logged into SPSO's server and downloaded SPSO's entire Platform, which
25 exceeded the scope of consent SPSO had granted Defendants, and thwarted the
26

27 ¹ All exhibits are attached hereto and included herein by reference unless
28 otherwise noted.

purpose for which Defendants were granted access as prospective customers.

20. SPSO discovered Defendants' infringing website on or about July 15, 2015 and promptly notified Defendants of infringement on that same day. *See Exhibit G*, notification of infringement to Defendants.

21. Defendants did not respond to SPSO's notification or otherwise communicate with SPSO regarding the theft of SPSO's property.

22. As of the filing of this Complaint, SPSO and Defendants have been unable to resolve this dispute amicably because Defendants have not responded to SPSO's attempts to communicate.

23. SPSO never entered into any agreement, express or implied, with Defendants that would permit Defendants to adapt or otherwise use the Platform; therefore, Defendants possess no rights whatsoever in the Platform, including any of the exclusive rights owned by SPSO under the Copyright Act or Arizona common law.

COPYRIGHT INFRINGEMENT

24. The Platform is an original work authored by SPSO, which is copyrightable under Copyright Act as amended.

25. The Platform contains "protectable elements" afforded copyright protection; said elements include, but are not limited to, the original written content, photos, graphics, selection and arrangement of both individually protectable and unprotectable elements, and other unique expressions set forth in the Platform.

1 website is likely to confuse consumers in the marketplace regarding the source or
2 sponsorship of the respective websites.

3 33. The confusion caused by Defendants is likely to result in consumers
4 assuming that SPSO is associated with Defendant.
5

6 **Count I – Copyright Infringement**
7 **[Copyright Infringement 17 U.S.C. § 501(a)]**

8 34. SPSO incorporates by reference all the allegations set forth in ¶¶1-33 as if
9 fully set forth herein.

10 35. SPSO is the rightful owner of intellectual property rights related to the
11 Platform and, pursuant to 17 U.S.C. § 102(a), owns a copyrightable matter in same
12 for which it has filed a registration application.
13

14 36. Defendants willfully and unlawfully reproduced, publicly displayed, and
15 created derivative versions of copyrighted elements of the Platform verbatim.
16

17 37. The Platform and the Infringing Content contain extensive, nearly identical
18 similarities, and are therefore substantially similar to one another in a manner that
19 would be readily recognized as such by a lay observer.
20

21 38. Defendants' infringement has caused SPSO actual damages.

22 **Count II – Unfair Competition**
23 **[Arizona Common Law]**

24 39. SPSO incorporates by reference all the allegations set forth in ¶¶1-33 as if
25 fully set forth herein.
26

27 40. Defendants have engaged in unlawful business acts or practices by
28 committing acts including computer fraud, trespass, and other illegal acts or

practices.

41. SPSO and its licensees, at all material times were and are engaged in competitive business with Defendants and Defendants' actions are likely to cause public confusion.

42. Defendants' learned confidential information about SPSO as a result of their misrepresentations, including information about SPSO's business model, operating procedures, techniques, and strengths and weaknesses.

43. Defendants intended to misappropriate, steal and exploit that information to gain a competitive advantage in the marketplace.

44. Defendants' misappropriation was willful and malicious.

45. SPSO was damaged as a result.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff SPSO respectfully requests that this Court:

Count I – Copyright Infringement

(A) Permanently enjoin Defendants and all other persons in active concert or participation with Defendants from continuing to infringe SPSO's copyrighted Platform;

(B) Order Defendants to delete and permanently remove copies of SPSO's Platform from each of the computers under Defendants' possession, custody or control;

(C) Award SPSO actual, consequential, and incidental damages in the amount to be proved at trial, including costs and attorneys' fees under 17 U.S.C. § 1203;

(D) Grant SPSO any other and further relief as this Court deems just and proper.

Count II – Unfair Competition

(A) Award SPSO the profits Defendants' have accrued from their misappropriations, misrepresentations and other unlawful acts that have caused both public confusion and inequitable market advantage;

(C) Award SPSO punitive damages for Defendants' willful and malicious misappropriation to deter others from acting in kind;

(D) Permanently enjoin Defendants and all other persons in active concert or participation with Defendants from continuing to use the confidential information and materials Defendants wrongfully acquired from SPSO and that are either used in competition with SPSO and its licensees, or which use confuses the public;

(E) Grant SPSO any other and further relief as this Court deems just and proper.

Designation of Place of Trial

SPSO hereby designates Phoenix, Arizona as the place of trial of the above styled matter.

Respectfully submitted this 14th day of September, 2015.



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SellPoolSuppliesOnline.com, LLC

EXHIBIT A

—Original Message—

From: David Hagen <cactuspools@aol.com>
 To: poolandspaparts <poolandspaparts@gmail.com>
 Cc: cactuspools <cactuspools@aol.com>
 Sent: Wed, Sep 17, 2014 12:37 pm
 Subject: Re: Questions

1. Shipping: How are the shipping rates handled? I noticed that you charge 9.99 shipping on smaller parts and \$4.50 handling. David also mentioned that they add \$2.50 for orders under \$15.00 on certain items, how is the rest of the shipping calculated? What is the Magic Formula!

Shipping rates can be done numerous ways. Calculated, flat rate, free shipping or a mix. When we set up your site we will set up 99% of the items under (bulk mail) 9.99 plus 4.50 handling, (3 day) 16 or 17.99 plus 4.50 handling and a 2 day 19.99 plus 2.50 handling. Most items will be under the specific amount where you can make a few bucks in shipping. You have the option to go in and change to a flat rate if it is close.

- a. Also, how is this handled? Automatically - or Manually?
2. We will set up the 3 rates. But you adjust as you go.
 - a. Shipping: How are the shipping rates handled? I noticed that you charge 9.99 shipping on smaller parts and \$4.50 handling. David also mentioned that they add \$2.50 for orders under \$15.00 on certain items, how is the rest of the shipping calculated? What is the Magic Formula!
3. The 2.5 is only Allied Inovatio orders, but just got out of a meeting with them and I think it will be waived!! Yeeeeee Haaaaaa

2. What if a customer orders multiple products? I understand that there are multiple shippers that some items will be dropped shipped from...how do you keep the shipping / handling from being astronomical.

3. How do we get the TABS on the whole goods to work? I will research this. It could be a gargantuan task or something easy. More info later. It hasn't affected sales, but then again we don't sell a ton of whole goods online. We are mostly in the business to make money and not give it away to customers. =)

Error from typical tab:

Error Type	Error Message Key	Message	Originator Command
0	_ERR_CMD_CMD_NOT_FOUND	User CMN3101E The system is unavailable due to "servlet". System Command not found: "servlet".	

4. Can I get some more specifics on the SEO/SEM - What is "truly" included with the set up and is this a one time thing and we are responsible for the ongoing, or is this something that is going to be ongoing with the monthly fee? (The sales materials are very vague) Seo is built into the website with blog features and the way Big Commerce lays out the site. You are responsible for ongoing SEO and SEM. We will set up your SEM with the google merchant account so you can utilize the google shopping feed. Keep in mind that google is fickle one month you will have 27,000 items in a shopping feed the next month only 16,000. You will just have to re upload the feed once per month.

5. How are site updates handled? Is this something that is ongoing as well, or are we responsible for that?

We are excited to get moving but I am very analytical and need to see how this "truly" operates as I have been playing on the site for a few days now and more questions are coming up than answers!!

David Hagen

Cactus Valley Pools
 Matrix Pool Products
 Blue Excess Pool Chemicals
 SellPoolSuppliesOnline.com
[SPSO](mailto:dhagen@cactuspools.com)

This electronic mail transmission contains information from Cactus Valley Pools, Matrix Swimming Pool Products, Matrix Swimming Pool Solutions, Blue Excess Pool Chemicals, iPool Construction or Sell Pool Supplies Online that may be confidential or privileged. Such information is solely for the intended recipient, and use by any other person is not authorized. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of this message, its contents or any attachments is prohibited. Any wrongful interception of this message is punishable as a Federal Crime. If you have received this message in error, please notify the sender immediately by electronic mail at dhagen@cactuspools.com.

-----Original Message-----

From: Mark Kesler <poolandspaparts@gmail.com>
 To: David Hagen <cactuspools@aol.com>
 Sent: Tue, Sep 16, 2014 8:15 pm
 Subject: Fwd: Questions

----- Forwarded message -----

From: **Brian Morris** <uglypoolguy@outlook.com>
 Date: Tue, Sep 16, 2014 at 7:52 PM
 Subject: Questions
 To: Mark Kesler <poolandspaparts@gmail.com>
 Cc: " mark@wefixuglypools.com" <mark@wefixuglypools.com>

1. Shipping: How are the shipping rates handled? I noticed that you charge 9.99 shipping on smaller parts and \$4.50 handling. David also mentioned that they add \$2.50 for orders under \$15.00 on certain items, how is the rest of the shipping calculated? What is the Magic Formula!
 - a. Also, how is this handled? Automatically - or Manually?
 - b. Is it programmed as part of the store and included as part of the online store
 - c. or is it up to the owner of the site to set the shipping on all 27,500 parts?
2. What if a customer orders multiple products? I understand that there are multiple shippers that some items will be dropped shipped from...how do you keep the shipping / handling from being astronomical.
3. How do we get the TABS on the whole goods to work?

Error from typical tab:

Error Type	Error Message Key	Message	Originating Command
0	_ERR_CMD_CMD_NOT_FOUND	User CMN3101E The system is unavailable due to "servlet/". System Command not found: "servlet/".	

4. Can I get some more specifics on the SEO/SEM - What is "truly" included with the set up and is this a one time thing and we are responsible for the ongoing, or is this something that is going to be ongoing with the monthly fee? (The sales materials are very vague)
5. How are site updates handled? Is this something that is ongoing as well, or are we responsible for that?

We are excited to get moving but I am very analytical and need to see how this "truly" operates as I have been playing on the site for a few days now and more questions are coming up than answers!!

"Swim"-cerely,
 Brian W. Morris
 The Ugly Pool Guy
www.WeFixUglyPools.com
 (O) 602-253-4499 / (C) 602-299-8162





















- The Only Thing That Should Be Ugly In Your Backyard...Is The Pool Guy!

EXHIBIT B

4:22 20 PM 8/29/2015

Logon: x All Pc x 5001 x Alien x Tools x EDoc x Pool x Pant x Web x Welc x Pool x 121 x Para x D MAC x A

ore-nxg4hzd.mybigcommerce.com/admin/index.php?ToDo=systemLog#

Username		Action	Date
			Prev 1 27
	admin	(Successfully logged in)	19th Sep 2014 @ 5:11 PM
	admin	(Successfully logged in)	18th Sep 2014 @ 9:59 PM
	admin	Changed status of order #40140 to Shipped	18th Sep 2014 @ 1:08 PM
	admin	(Successfully logged in)	18th Sep 2014 @ 1:07 PM
	admin	Updated product Valtterra Products [(1001-7N) Santoprene Valve Seal 1.5" 1001-7N	18th Sep 2014 @ 9:58 AM
	admin	saveNewShipment (40139, Shipped)	18th Sep 2014 @ 9:56 AM
	admin	saveNewShipment (76)	18th Sep 2014 @ 9:56 AM
	admin	(Successfully logged in)	18th Sep 2014 @ 9:37 AM
	admin	saveNewShipment (40141, Shipped)	17th Sep 2014 @ 10:17 AM
	admin	(Successfully logged in)	17th Sep 2014 @ 10:14 AM
	admin	refundOrder (40044, Refunded)	17th Sep 2014 @ 9:26 AM
	admin	(Successfully logged in)	17th Sep 2014 @ 9:09 AM
	admin	(Successfully logged in)	17th Sep 2014 @ 7:51 AM
	admin	(Successfully logged in)	17th Sep 2014 @ 7:49 AM
	ahpoolman@yahoo.com	(Successfully logged in)	16th Sep 2014 @ 8:29 PM
	admin	refundOrder (40138, Refunded)	16th Sep 2014 @ 7:54 PM
	admin	(Successfully logged in)	16th Sep 2014 @ 7:53 PM
	admin	(Successfully logged in)	16th Sep 2014 @ 6:54 PM
	admin	Added export template BulkEditStoreCopy	16th Sep 2014 @ 6:52 PM
	admin	(Successfully logged in)	16th Sep 2014 @ 6:50 PM

Prev 1 27

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EXHIBIT C